FOR INFORMATION

(3)

No. 85-231

Supreme Court, U.S.
FILED
SEP 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BOATING INDUSTRY ASSOCIATIONS,
TRAILER MANUFACTURERS ASSOCIATION
and DONALD I. REED,
Petitioners

v.

DENNIS G. MOORE and GEORGE R. MOORE,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Respondents have not joined issue on the single feature of this case which requires that the Petition for Certiorari be granted and the case remanded for a new trial. They do not dispute—and indeed it is beyond dispute—that the District Court gave an instruction which permitted the jury to impose liability solely on the basis of the "arbitrariness" of the certification process and without regard to the competitive impact of the Petitioners' actions. This instruction, to which the Petitioners objected, is set forth on Page 5 of the Petition for Certiorari.

The Court of Appeals upheld this instruction and rendered a decision four months prior to this Court's decision in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, No. 83-1368 (June 11, 1985). Based on *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), the Court of Appeals expressly refused to consider the reasons for the Petitioners' decisions, reasoning that since Petitioners failed to provide Respondents with "notice and an opportunity for a hearing . . . there is no occasion for us to pass on the sufficiency of the reasons" for the Petitioners' certification decision. (Pet. App. at 21a. See also *Id.* at 14a, 28a.) The language quoted and relied upon by the Seventh Circuit is from the *Silver* opinion, 373 U.S. at 365.

Thus, the Court of Appeals here, like the Ninth Circuit in *Northwest Wholesale Stationers, Inc.*, has predicated liability solely on what it concluded was a process defect. This Court, by contrast, held in *Northwest Wholesale Stationers, Inc.* that "the absence of procedural safeguards can in no sense determine the antitrust analysis . . . . (Slip Op. 8-9.)

It is this feature of the Seventh Circuit's holding—permitting the jury to find antitrust liability based solely on a process defect—that renders it squarely inconsistent with *Northwest Wholesale Stationers, Inc.* It is a feature of the case whose existence the Respondents do not deny and cannot deny. Instead, respondents, after inviting the courts below to impose liability upon petitioners on a process theory, now attempt to avoid the consequences of that tactical judgment by arguing that a process theory was not necessary to those holdings. The Court need not speculate about this issue; respondents will have their opportunity to prove that liability was appropriate without regard to the process used by petitioners—on retrial before the district court.

Accordingly, the Petition for a Writ of Certiorari should be granted, the judgment of the Court of Appeals va-

cated, and the case remanded to the Court of Appeals, so that the Court of Appeals can remand to the District Court for a new trial in light of this Court's decision in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*

Respectfully submitted,

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